

Approved
Your copy,
FILED

MAY 10 1949

W. F. MATTHEWS, County Clerk
By E. JAMES DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF BUTTE

IN THE MATTER OF THE DETERMINATION
OF THE RIGHTS OF THE VARIOUS CLAIMANTS
TO THE WATERS OF THAT PORTION OF BUTTE
CREEK AND ITS TRIBUTARIES SITUATE ABOVE
THE WESTERN DAM NEAR NELSON, BUTTE
COUNTY, CALIFORNIA.

No. 18917

MEMORANDUM AND ORDER

M E M O R A N D U M

By a memorandum filed on June 6th, 1948, I expressed the opinion that the present owners and licensees of water discharged by the Pacific Gas and Electric Company into Butte Creek below the Centerville Power House have the right to take that amount of water, when and as discharged, less five per cent to cover loss in transit, out of the Creek, but have no right to take any part of the natural flow of the Creek at any time other than such amount as they must take into the Parrott Ditch and deliver to persons who have adjudicated rights to receive a part of the natural flow. If the facilities of the owners of the foreign water were not adequate to permit them to receive it, in the Parrott Ditch when and as it was discharged or to use it on their lands, it would flow down the stream. I directed the Watermaster so to control the water of the stream as to permit all of the natural flow, other than that to which land owners

1 supplied by the Parrott Ditch were entitled, to flow past the
2 diversion works of the owners of the foreign waters at all times.
3 Reference is made to that memorandum and order for further
4 particulars.

5 During the irrigation season the Watermaster applied the
6 rule that I suggested. The owners of the water below the point
7 of diversion, which is known as the Crouch Dam, actually re-
8 ceived their full entitlement at all times. But the owners of
9 the foreign water received, during the season, an average of
10 10.8 cubic feet per second, less than the amount of foreign
11 water that was discharged into the stream.

12 The case was reopened for the purpose of permitting the
13 owners of the foreign water to allege prescriptive rights and
14 considerable evidence was introduced bearing upon that issue.
15 Prescriptive rights were not considered in my original memoran-
16 dum. I treated the rights of the parties as I would have
17 treated them if all of the foreign water had been acquired
18 immediately before the commencement of the present proceeding.

19 It is convenient to refer to the Durham Mutual Water
20 Company as the petitioner and the owners or licensees of the
21 foreign water as the respondent corporations, and to ignore for
22 the present the rights of the persons who take a part of the
23 natural flow of the stream from the Parrott Ditch.

24 On May 25, 1920, a decree was entered in the case of
25 Central California Investment Company v. John Crouch Land Com-
26 pany in the Superior Court in and for Sutter County in which
27 most of the water in Butte Creek was apportioned. In this
28 decree, in respect to the foreign water, it was provided that
29 the predecessors in interest of the respondent corporations
30 "shall hereafter be entitled to take from Butte Creek whatever
31 amounts of such foreign waters they may cause to be turned into
32 said Creek, from time to time, less 5 per cent of such amount of

1 water, which it is hereby determined and agreed will be lost in
2 flowing from the point at which the same is turned into said
3 Butte Creek to the point of diversion."

4 The foreign water referred to in the decree was water
5 that had been appropriated from the West Branch of the Feather
6 River and transported through the Hendricks Ditch to the reservoir
7 or forebay of the Pacific Gas and Electric Company at De Sabla.
8 From time to time this water was released to flow through the
9 De Sabla Power Plant and Centerville Power Plant into Butte
10 Creek. From that point on the water belonged to the predecessors
11 in interest of the respondent corporations.

12 It should go without saying that the right which the
13 original purchasers of this water acquired some 40 years ago
14 was the right to take out of Butte Creek from time to time an
15 amount of water that was equal to the amount of foreign water
16 that was discharged into the Creek from time to time, less loss
17 in transit. The foreign water and the natural water would be
18 commingled but the amount of water to which the owners of the
19 foreign water were entitled could be measured at any time with
20 a fair degree of accuracy.

21 Within the past 20 years the respondent corporations
22 have acquired from the State of California a permit to use
23 additional foreign water. This water is impounded by the Pacific
24 Gas and Electric Company and is released into the West Branch
25 of the Feather River and picked up and transported through the
26 Hendricks Ditch, the reservoir and the two power plants and
27 discharged into Butte Creek along with the foreign water which
28 belongs to the corporation respondents. The judgment entered
29 November 6, 1942, is based on the original judgment but provides
30 for the rediversion of the additional foreign water also. It
31 prescribed that "the total quantity available for such rediversion
32 shall be determined as the difference between the total quantity

1 delivered into Butte Creek and five per cent thereof" for loss
2 in transit, this water being delivered into Butte Creek at the
3 Centerville Power Plant.

4 Here we have a measurable quantity of water delivered
5 into Butte Creek at a fixed point from time to time which the
6 respondent corporations were given the right to take out of
7 the Creek. The decree, by its terms, can mean nothing other
8 than that the respondent corporations were given the right to
9 redivert that quantity of water, less five per cent thereof,
10 when it arrived at the Crouch Dam.

11 If rights had been acquired by prescription to take a
12 part of the natural flow when there was no foreign water in the
13 Creek, those rights should have been set up and litigated.
14 Since such rights were not litigated and established by the
15 decrees, they were necessarily foreclosed by the decrees.
16 There is no reference in either of the decrees to the method of
17 diversion and it is contended in behalf of the respondent cor-
18 porations that the decrees had reference to existing methods
19 of diversion. This contention is, in my opinion, untenable.
20 The decrees established legal rights to quantities of water and
21 the means of diversion should obviously be adjusted to meet
22 the terms of the decrees.

23 However, I can find no substantial evidence of a pre-
24 scriptive right, regardless of the terms of the decrees. It is
25 suggested by counsel for the respondent corporations that the
26 evidence indicates that it was the practice of the respondent
27 corporations to divert into the Parrott Ditch constantly the
28 amount of water that flowed in the Hendricks Ditch. It is true
29 that as long as such measurements were taken notice of the
30 measurements were sent daily to the person in charge of the
31 Parrott diversion. But the evidence shows that such a constant
32 flow was not permitted. During a period of time an arrangement

1 was made with the Pacific Gas and Electric Company to have
2 someone telephone when the foreign water was released, and those
3 in charge of the diversion took note of the wave of foreign
4 water. It is true that the representatives of the respondent
5 corporations and the State Land Settlement Board and later the
6 petitioner cooperated in the division of the water almost daily
7 and sometimes several times a day and that there were meetings
8 at which policies were established. But there is no evidence
9 that the respondent corporations or their predecessors in inter-
10 est claimed the right to have a portion of the natural, steady
11 flow of the Creek diverted into their ditch in exchange for a
12 sporadic, fluctuating flow in an equal amount. Also it is
13 clear to me that prescriptive rights could not have been secured
14 as against the State Land Settlement Board. The Board was an
15 agency of the State and sold or contracted to sell land with
16 water rights appurtenant thereto, but it retained control over
17 the water and served the purpose of an irrigation district.
18 Its acts were therefore governmental.

19 When the Watermaster took charge pursuant to the terms
20 of the last decree he undertook to divide the water in the
21 manner in which he was informed it had been divided by mutual
22 agreement of the parties. The result was that the petitioner was
23 given substantially the amount of water to which it was entitled
24 under the decree on a daily average, but that the water that it
25 received was not in a steady flow, but in a fluctuating flow
26 that was always inconvenient and sometimes damaging. For this
27 reason the petitioner instituted the present proceeding.

28 I cannot see how a Court could find that the petitioner
29 is not entitled to its entitlement of water in a steady flow if
30 it demands that right. The only right that the respondent cor-
31 porations have is to take out the foreign water as it comes down
32 the stream. If they fail to furnish such diversion facilities

1 as would permit them to take and use all of the foreign water,
2 a part of the water will be lost by them. This is unfortunate,
3 and insofar as it is possible to do so the watermaster service
4 should be so amplified as to prevent such a loss.

5 The evidence indicates that the loss could be reduced
6 to a minimum if 24 hour watermaster service were furnished.
7 If it is possible to do so, an appropriation which would be
8 sufficient to provide such amplified service should be secured
9 and the charge should be passed on to the owners of the lands
10 within the district served by the watermaster. I think that the
11 difficulty can be overcome in time and all of the foreign water
12 as it comes down the Creek will then be delivered to the res-
13 pondent corporations. In the meantime the respondent corporations
14 can if they choose cooperate with the watermaster in such a way
15 as to reduce the loss of their excess water down the stream.

16 The owners of a portion of the natural flow of the stream
17 who are served from the Parrott Ditch have been given notice of
18 this proceeding and have made no objections.

19
20 O R D E R

21
22 The application of the Durham Mutual Water Company, a
23 corporation, for an order of this Court to require the Water-
24 master in charge of the distribution of water at the Crouch Dam
25 to permit 96.66 cubic feet per second of the natural flow of
26 Butte Creek to flow over the Crouch Dam at all times between
27 April 1 and October 15 of each year, as provided in the decree
28 entered in the above entitled proceeding, having been fully
29 heard and argued and submitted to the Court for decision:

30 IT IS ORDERED that said application be, and it is granted.

31 IT IS ORDERED FURTHER that the said Watermaster be, and he
32 is, directed, within the limits of the funds now available, or

1 which may be made available, so to amplify the water service as
2 to permit as little as possible of the foreign water which
3 belongs to the respondent corporations to pass over the Crouch
4 Dam.

5 IT IS FURTHER ORDERED that this Court will retain juris-
6 diction over the present application to make additional orders
7 consistent with the foregoing upon application of any party
8 hereto.

9 Dated May 10, 1949.

10
11 Harry Deirup, Judge
12

13 Two copies each will be mailed to:

14 P. J. Minasian, Esq.
15 Oroville, California

16 Henry Holsinger, Esq.
17 Division of Water Resources
18 Department of Public Works,
19 Sacramento, California

20 One copy each will be mailed to:

21 Messrs. Price & Morony
22 Chico, California

23 Messrs. Ware & Ware
24 Chico, California
25
26
27
28
29
30
31
32

RECORDED 11 MAY 1949

RECORDED
DIV OF WATER RESOURCES
RECEIVED